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Statutes, Constitutional Provisions and Rules

In the

Supreme Court of the United States

October Term, 1948

No. 453

MORRISON T. WADE, Petitioner

v.

THE PEOPLE OF THE STATE OF MICHIGAN

On application for writ of certiorari to the Recorder's Court of the City of Detroit, Michigan.

Brief opposing Petition for Rehearing

I

Concise Statement of Matter Involved.*

In our brief opposing petition for certiorari, pp. 2-5, we disputed the only two possible grounds on which pursuant to Title 28 U.S.C. § 1257 (3) counsel might urge the Court to take jurisdiction of this cause:

[*]

Unless otherwise plainly indicated, numbers in parentheses refer to pages of the printed transcript of record.

First: With respect to the suggestion[1] that in the court below, the validity of a state statute,[2] had been drawn in question on the ground of its being repugnant to the Constitution of the United States, we replied in substance and effect

(a) that although in his motion to dismiss (Ex. 4, pp. 17-78), the petitioner had averred "in the most general language possible", that Michigan's one-man grand jury law, so-called (note 2), violated certain fundamental rights guaranteed in the Federal Constitution,[3] he did not "specify in what manner the petitioner was affected thereby";[4] and

(b) that the record fails to show that petitioner "*urged*" the court below to find that Michigan's one-man grand jury law was repugnant to the Constitution of the United States, or that the court

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[1]

It was no more than a suggestion, for in quoting from § 1237 (3) of Title 28 U.S.C., Revised, counsel deleted the phrase: "Where the validity of a state statute is drawn in question etc.".

[2]

Mich. Code of Crim. Pro., ch. 7, §§ 3-6; Mich. Comp. Laws 1948, §§ 767.3-767.6; Mich. Stat. Ann. (Henderson) §§ 28.943-28.946.

[3]

Article IV, § 4, guaranteeing a "republican form of government", and the 14th Amendment, guaranteeing due process of law, and the equal protection of the law.

[4]

Petitioner merely asserted (18-19) that (I) "the so-called one-man Grand Jury law (citing it) . . is unconstitutional in that it violates the 14th Amendment to the United States Constitution" and quoted the due process and equal protection clauses; and (II) "that it is in violation of Section 4 of Article IV" thereof, "guaranteeing a republican form of government to all the states and the citizens thereof".

passed upon its validity; and that the transcript (Ex. 6, pp. 24-58) of hearing in open court, indicates no discussion of the federal question".

Second: With respect to the point, not clearly asserted, that in the proceedings below, a right, privilege or immunity was specially set up or claimed for the petitioner under the Constitution of the United States,[5] we answered as follows:

"**(a)** In the petitioner's motion (Ex. 5, pp. 18-23) to dismiss and quash the order to show cause, no title, right, privilege or immunity was specially set up or claimed for him under the Constitution of the United States.

"**(b)** At no point in the transcript of testimony taken at the hearing on the order to show cause (Ex. 6, pp. 24-58), or in the colloquy between court and counsel on that occasion, did the petitioner or his counsel set up or claim such title, right, privilege or immunity under the Constitution of the United States; nor did he at any time claim that the court had denied him a federal constitutional right by refusing to permit him to have witness in his behalf; nor did he at any time assert that his conviction of contempt of court 'after having produced the books and records required' was a denial of due process under the Fourteenth Amendment."

In our counter-statement of the case, brief, pp. 8-9, we pointed out that the record (as settled in the court below) is silent on what transpired if and when the motion to dis-

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[5] Paraphrasing Title 28 U.S.C. § 1257 (3).

miss was argued and denied, and we referred to two journal entries, Appendix A and Appendix B, our brief, from which it appeared that on the 9th day of June 1948, "a motion to dismiss the order to show cause . . . is now heard by the court, in part", and that the hearing was continued to June 10, the following day; and that on the 10th day of June 1948 upon conclusion of the hearing on the order to show cause, the petitioner was adjudged guilty of contempt and sentenced therefor.

> "But (we said, p. 9) there is nothing in the record of such proceedings to show that the petitioner urged upon the court consideration of any federal questions".

Again, on pp. 11 and 12 of our brief, referring to the petitioner's request to produce witnesses (and obtain a further adjournment), we stated, p. 12,

> "After considerable argument, during which it may be noted there was no insistence upon federal constitutional rights as such, the petitioner was recalled to the stand;"

Finally, on p. 15 of our brief, after discussing petitioner's claim that the so-called one-man grand jury act of Michigan (note 2) violates the 14th Amendment, we said:

> . "Moreover, as we have noted in our counter-statement concerning jurisdiction, this question was not urged in the court below".

Petitioner filed no reply to our brief opposing his petition for certiorari, nor did he request such a privilege.[6]

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[6] Counsel for petitioner were most generous in consenting to the enlargement of the time for filing our brief opposing the petition for certiorari. We certainly would not have objected to the filing of a reply brief, or to any extension of time for that purpose.

Counsel now moves for a rehearing (Court Rule 33) of his petition for a writ of certiorari, on the ground that "he believes that the denial by this Court of his application for Writ of Certiorari . . was based upon a misapprehension of the facts brought about by the erroneous impression created by the brief of the Solicitor General of Michigan. That in his brief there appeared repeatedly the misstatements of fact, viz., that no Federal constitutional questions were raised in the lower court and that no constitutional questions were urged or argued and therefore were not passed upon by the lower court".

Our reply:

1. We do not propose to recant any statement in our brief opposing the petition for certiorari, for we relied upon the record as settled and were justified thereby.[7]

2. For present purposes only we are willing to accept as the record of petitioner's argument on the motion to dismiss, the unauthenticated transcript "Exhibit B" attached to the petition for rehearing. Even so, we still insist that the questions there presented were non-federal in their main aspects.

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[7]

Counsel is correct in saying, petition for rehearing, pp. 5-6, that "the Solicitor General who wrote the brief was not present at the hearing on said motion to dismiss and therefore cannot have any personal knowledge as to what transpired in the lower court". We respectfully submit he had a perfect right to rely upon the transcript of record served upon him.

II

The Argument.

Point One

The statements in respondent's brief were based upon the printed transcript of record, and were justified thereby.

Counsel for petitioner, whose good faith we do not question,[8] is slightly mistaken when he states, petition for rehearing, p. 2, we said in our brief "that no Federal constitutional questions were raised in the lower court", for we did not go that far.

As heretofore noted, what we did say in our brief, p. 3, was that "the motion to dismiss . . . barely averred in the most general language possible, that the (one-man grand jury) act . . violated the constitutional guarantees aforesaid (republic form of government and due process), but did not specify in what manner the petitioner was affected thereby", and this is perfectly true (18-19).

Counsel then state, p. 2, that

> "the record clearly shows that Federal constitutional questions were raised. These Federal constitutional questions appear in the motion to dismiss (R. 18-19). They were argued, as appears by the Record, page 47, and the affidavit of the attorney for petitioner

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[8]

Counsel merely errs on the side of overzeal, and we do not choose to consider his attack as personal. We'll be just as good brother officers of this Court as we ever were, when this controversy is ended.

marked Exhibit A hereto attached and made a part hereof, and that part of the transcript relating to the argument of the Federal constitutional questions in the motion to dismiss, which is marked Exhibit B hereto attached and made a part hereof".

As heretofore stated, our complaint was that while such federal constitutional questions were "raised" in petitioner's motion to dismiss, the allegations were not sufficiently specific to require serious consideration.

Nor can we agree that page 47 of the record indicates that such questions were argued. It is true that counsel there referred to "the legal and constitutional questions we have raised"; but this does not necessarily imply that federal constitutional questions were argued. And counsel himself does not seem to rely too heavily upon page 47 of the record for in the next breath he turns to documents strictly "off the record".

Moreover, it does not clearly appear from the record that the court below necessarily decided the Federal constitutional questions so indefinitely raised; and he expressed no opinion, so far as the settled record discloses.

There are at least two further indications that the court below did not necessarily decide a federal constitutional question of substance:

1. The petition for certiorari, p. 2, recites:

"This case challenges the *power* of the judges of the State of Michigan to act as so-called one man grand juries, and their *power* to find persons guilty of contempt of court while acting as one man grand juries".

If, as seems to be the case, the question is merely one of judicial power under the Constitution and laws of the State of Michigan, and if, as counsel contended when arguing his motion to dismiss, the issue is whether the Michigan one-man grand jury law is in violation of "the fundamental principles of division of the powers of State government",[9] then no federal question is involved, and the State Constitution alone controls decision.

2. Again, in counsel's "Statement as to Jurisdiction", petition for certiorari, p. 7, it is said:

> "It is respectfully submitted that the conviction of petitioner of contempt of court *without being permitted to have witnesses in his behalf* amounts to no proper hearing and his conviction of contempt of court after having produced the books and records required was a denial of petitioner's rights under Section 1 of the 14th Amendment to the Constitution of the United States . . " [Italics are ours throughout]

We would appreciate the courtesy if counsel for petitioner will point out the pages of the printed transcript of record which indicate that *this* particular federal constitutional question was raised in the court below, or where on the fact of the printed record the petitioner, through his counsel, specially set up or claimed such a federal constitutional right, Title 28, U.S.C. § 1257 (3).

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[9]

Even in his brief in this Court, petitioner so claimed, citing a decision of the Michigan Supreme Court, Local 170, Transport Workers Union of America v. Paul V. Gadola, Circuit Judge, 322 Mich. 332, holding that such fundamental principles are preserved by Art. 4, Sec. 2 and Art. 7, Sec. 9 of the State Constitution of 1908.

At the hearing on order to show cause, after the petitioner had testified (27-33), after other witnesses had been heard (24-27; 33-38), and following colloquy between court and counsel (45-48), counsel for petitioner announced he was "unprepared to proceed" because he had "witnesses to subpoena".

Questioned by the court as to the witnesses desired, counsel proceeded to argue, claiming, among other things, that he should have the full transcript of the proceedings before the grand jury at the time when, it was alleged, the petitioner was in contempt of court (48); and he urged "that it would be manifestly unfair and a mockery of justice for the prosecuting attorney to select excerpts out of the context of all surrounding testimony, those parts which isolated in his judgment will give the indicia of contumacy" (49).

And counsel continued to urge the point (49) and to offer the testimony of certain witnesses.

Finally (52), after considerable discussion, counsel recalled petitioner to the stand, and petitioner testified in effect that he was now willing to produce the books and records desired by the judge.

We respectfully note that throughout the foregoing discussion, not once did the petitioner or his counsel specially set up or claim any right, privilege or immunity under the Constitution of the United States; indeed, the Federal Constitution was not mentioned, nor did counsel cite any decision of this Court.

After the petitioner was adjudged guilty of contempt of court, counsel for petitioner announced (57) he would ap-

peal to the Supreme Court of the State, but he filed no motion for rehearing.

In his application to the Michigan Supreme Court for leave to appeal, the petitioner alleged (1) that "prejudicial error was committed by said court at the trial of said cause, in the following particulars", and he proceeded to set forth (1-4) approximately 16 assignments of such error, numbered (a) to (p), inclusive.

Among such assignments, only two, (a) and (b), specifically raised or attempted to raise a federal constitutional question:

> "**(a)** The so-called one-man grand jury law . . . (citing the statute) . . . is unconstitutional in that it violates the 14th Amendment to the United States Constitution, which states among other matters: (quoting the due process and equal protection clause).
>
> "**(b)** That is is in violation of Section 4 of Article IV of the Constitution of the United States guaranteeing a republican form of government to all the States and the citizens thereof".

Other assignments are purely local in nature, (c) invoking the due process clause of the Michigan State Constitution; (d) challenging the jurisdiction of the judges of the court below to initiate criminal proceedings; (e) questioning the validity of the subpoena duces tecum; (f) claiming that the books and records sought by said subpoena to be produced, were not material as evidence; (g) contending that such books and records were already in possession of the grand jury; (h), presently considered; (i) attacking the jurisdiction of the judge on the ground he

had not taken the oath required of a grand juror; (j) to the effect that petitioner had purged himself of contempt; (k) putting in issue the alleged prejudice of the judge; (l) stating that the judge was not sitting as a court; (m) alleging that the conviction was "contrary to law", (n) that it was contrary to the facts, (o) that there was no showing of contempt, and (p) that the judge had prejudged the respondent.

It was alleged in assignment (h), *supra*,

> "(h) That the petition (Exhibit 3) upon which the order to show cause is based sets forth fragmentary, incomplete and selective portions of what transpired, and therefore is not a fair and proper petition for an order to show cause and conviction thereunder" (3).

But it can scarcely be urged that this statement specially sets up or claims a right, privilege or immunity under the Constitution of the United States.

While in assignment (j), *supra*, the petitioner avers that "the respondent purged himself of contempt by delivering the disputed records demanded by the grand jury", he does not claim that this was a constitutional right protected by the Constitution of the United States; nor does he assign error at all upon the claim, now asserted, that he was denied opportunity to produce the testimony of witnesses in his behalf.

Point Two

The transcript attached to the petition for rehearing, does not clearly indicate a purely federal constitutional question.

In his petition for rehearing, counsel for petitioner goes outside the record certified by the judge of the court below, and considered by the Michigan Supreme Court on application for leave to appeal, to produce and print as "Exhibit B" a transcript of proceedings had upon argument of petitioner's motion to dismiss. Such argument covers approximately 16 printed pages.

Quickly summarized, counsel's argument runs something like this:

Counsel first directed attention to grounds I and II of his motion to dismiss, *viz.*, that the one-man grand jury law violates the due process clause of the 14th Amendment, as well as Art. IV, § 4, of the Constitution, guaranteeing a republican form of government; and he also called attention to the fact that another pending cause involved much the same questions (petition, p. 8).

After mentioning the decision of this Court in the "Oliver Case", *In re Oliver*, 333 U.S. 251, counsel indicated he would discuss the facts in the case at bar, and the law involved.

The points which counsel attempted to make, were these:[10]

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[10]

The points so made are here condensed into our own language, and then are stated as we understand counsel's argument, without trying to quote them.

1. If the judge of the court below who issued the order to show cause, *was* acting as a one-man grand jury pursuant to the act in question, he was without jurisdiction because previous to beginning his work he had not taken the oath of a grand juror which is required by law.[11]

2. If such judge was *not* so acting, but was engaged in the conduct of a "judicial inquiry", as the prosecuting attorney was said to claim (and we are inclined to that view), then the proceedings were invalid on two grounds:

(a) Because (as counsel contended) the petition and order pursuant to which the judge was acting, called for the constitution of a "one-man grand jury" rather than a "judicial inquiry".

(b) Because, under the authority of an opinion written by the late Mr. Justice Cardozo when chief judge of the Court of Appeals of the State of New York, *In re Richardson*, 247 N.Y. 401, 160 N.E. 655, the one-man grand jury act of Michigan permits a person belonging to the judicial department of government to exercise the powers of an "inquisitor", meaning, we suppose, the powers of a person belonging to another department of government.

Thus, we respectfully submit, although counsel clothed his argument in Federal constitutional phrases, such as "due process" and "republican form of government", and

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[11]

Under Michigan law, on those rare occasions calling for the drawing of a traditional 16-member grand jury, the clerk of the court is required to prepare an alphabetical list of all persons returned as grand jurors and to administer to each of them a prescribed oath. Mich. Code of Crim. Proc., chap. 7, § 9; Comp. Laws 1948, § 767.9; Mich. Stat. Ann. § 28.949.

while he paid eloquent tribute to fundamental principles, nevertheless the questions he actually posed were strictly non-federal.

Surely, the claim that the judge should have taken the oath prescribed by law for members of 16-man grand juries, involved merely the construction of the statute in question; and the interpretation of the petition and order under the terms of which the judge conducted the proceedings in the court below, was a matter of local concern.

The opinion of Judge Cardozo *In re Richardson, supra*, 247 N.Y. 401, 160 N.E. 655, involved no federal constitutional question, but held (Syl. 1) that

> "section 34 of the (N.Y.) of the Public Officers Law (Cons. Laws, ch. 47), . . . in so far as it attempts to charge a justice of the Supreme Court with the mandatory performance of duties non-judicial, by making him the delegate of the Governor *in aid of an executive act*, the removal of a public officer, is invalid. There is no inherent power in Executive or Legislature to charge the judiciary with administrative functions except when reasonably necessary to the fulfillment of judicial duties and the essence of the judicial function may not be destroyed by turning the power to decide into an opportunity to consult and recommend". [Emphasis, ours].

The opinion further held that service by a justice of the Supreme Court as commissioner in removal proceedings under the foregoing section of the act was acceptance of a public trust within the prohibition of section 19 of article 6 of the State Constitution of New York providing that "justices of the Supreme Court shall not hold any other

public office or trust, except that they shall be eligible to serve as members of a constitutional convention".[12]

Not once during the course of his opinion did this learned jurist hold that the New York law violated any provision of the Constitution of the United States.

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[12]

Cf. Mich. Const. 1908, Art. IV, § 2, and Art. 7, § 9; and see Local 170, T.W.U. v. Circuit Judge, 322 Mich. 332.

III

Conclusion

We respectfully submit that petitioner's application for a rehearing of his petition for certiorari should be denied.

Respectfully Submitted,

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